HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $2.50 PER ANNUM . . . . . 85 CENTS PER NUMBER

THE PRESENT APPROACH TO CONSTITUTIONAL DECISIONS ON THE BILL OF RIGHTS. — Constitutional decisions significantly demonstrate that "general propositions do not decide concrete cases." But the manner of approach to such general propositions, the rigidity or flexibility which is assumed for their content, *do* decide cases. In 1907 a unanimous Court of Appeals in New York declared unconstitutional a statute prohibiting night work for women, as a denial to women of "equal rights with men." [1] Refusing to be bound by its earlier decisions the same court has now sustained the second attempt of the legislature to prohibit night work by women, sustained it as a protective measure of the state to safeguard the health of its women engaged in industry, and therefore as a measure in the interest of the "general welfare of the people of the state." *People* v. *Charles Schweinler Press*, 53 N. Y. L. J. 81. In neither opinion is there any dispute as to general principles; nay more, there is no conflict whatsoever between the legal principles applied by the two cases. But the application of the same legal principles to the same statute [2] produces a complete reversal in result — a result of incalculable importance when translated into terms of wealth and welfare. Evidently, then, we are in the presence of a change of temper in the court, involving a change in the content of familiar legal principles, a change in judgment screened by formal prin-

[1] People v. Williams, 189 N. Y. 131, 81 N. E. 778, 20 HARV. L. REV. 653.

[2] There is a slight difference in detail between the two statutes which the Court, with fine candor, dismissed as irrelevant to the constitutional issue.

ciples, the judgment, that is, "as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." [3]

At such a period of legislative emphasis in the law as the present, with reasonable likelihood of extension of state activity, such a change of attitude on the part of the highest court in the largest industrial state in the Union would in itself be amply significant to arouse lawyers to inquire as to the implications of such a decision. When, however, the New York court only illustrates a nation-wide phenomenon, such an inquiry, and a professional readjustment to its results, are imperative. The *Schweinler* decision involves, it is submitted, three implications of vital moment to constitutional adjudications, once they become part of the emotional stock as well as the intellectual belief of the profession.

First: Questions as to the constitutionality of modern social legislation are substantially questions of fact. The formulæ of the Bill of Rights do not furnish yardsticks by which the validity of specific statutes can be measured. Concepts like "liberty" and "due process" are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. The legal principles cannot be applied *in vacuo*. In the famous *Ives* case [4] a great body of industrial and social data gathered by the Wainright Commission, on which the New York legislature acted in passing the workmen's compensation act, was brushed aside as irrelevant to "the purely legal phases of the controversy." In the *Schweinler* case the same court considered at length the data as to the relation of night work to women's health, gathered by the Factory Investigating Committee, upon which the New York legislature based the act in question. Deference to this data was the very foundation of the court's decision on the legal question.

Secondly, and closely following as a corollary, inasmuch as facts are dynamic, constitutional decisions upon which they must be based cannot be static. Conditions change, legislation deals with these changed conditions, and so must the courts. A book like Miss Goldmark's "Fatigue and Efficiency" completely undermines prevalent assumptions as to facts and, thereby, may well destroy the very groundwork of prior judicial decisions. Therefore the doctrine of *stare decisis* has no legitimate application to constitutional decisions where the court is presented with a new body of knowledge, largely non-existing at the time of its prior decision. This was precisely the situation in the *Schweinler* case. The seven years that elapsed between it and the *Williams* case developed an overwhelming mass of authoritative data, and it is by the light of such new knowledge that the justification of legislative action must be determined. Therefore a difference in attitude or result of constitutional decisions very frequently reflects only a corresponding development in the technique, or the new material, of the related social sciences. But frequently the court is left without proper aid as to the

[3] This profound observation Mr. Justice Holmes has often given expression to in his writings and decisions: see 10 HARV. L. REV. 457, 466; THE COMMON LAW, 35, 36; Vegelahn *v.* Guntner, 167 Mass. 92, 105–106; Lochner *v.* New York, 198 U. S. 45, 76.

[4] Ives *v.* South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431.

existing facts supporting contested legislation, and herein we touch most intimately the responsibility of the profession and especially of legal education. These issues cannot be disposed of as abstract legal questions. Law must be related to the other social sciences. When the New York Court of Appeals refuses to follow the *Williams* case, because "of failure adequately to fortify and press upon our attention the constitutionality of the former law as a health and police measure, and to sustain its constitutionality by reference to proper facts and circumstances," it draws a heavy indictment against the Bar. Undoubtedly the last few years have seen progress. In fact since the *Muller* case,[5] a new method of presenting constitutional questions to courts has gradually made its way, namely, by pressing home justification for a given statute by an authoritative marshalling of facts directed to the specific subject matter and the specific circumstances of particular jurisdictions.[6]

Thirdly, there is involved a changing realization of the proper scope of the judiciary in the distribution of governmental powers. Of course lip service has always been paid to the fundamental of American constitutional law, that the wisdom or justice of legislative policy is entirely outside the judicial province. But the rule has not always been honored in observance. Its application necessarily has become obscured where issues that involve conflicts of fact — such as the regulation of hours and conditions of employment — are treated as detached principles of law. But the matter lies deeper than that. We needed to be reminded authoritatively that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics.'" Here, as elsewhere, the emphasis makes the song. In the *Williams* case there is clearly discernible a feeling on the part of the court that it is its duty to serve as a barrier against the current tendency of collectivist legislation.[7] A different note is struck when the same court in one of its recent decisions,[8] of which the *Schweinler* case is the culmination, quotes approvingly the admonition of the Supreme Court, "it must be remembered that legislatures are ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts."[9] The admonition is profoundly important, particularly at a time of active legislation. It is an admonition that was sounded long ago before the controversial days by a great

[5] Muller *v.* Oregon, 208 U. S. 412.

[6] See Briefs in Stettler *v.* O'Hara (minimum wage case) now pending before the Supreme Court of the United States on appeal from Oregon (139 Pac. 734). An examination of the briefs in the much criticised case of Coppage *v.* Kansas, 236 U. S. 1, makes one wonder whether a different result might not have been reached if the Court had had before it the mass of material available, at this stage of things, to demonstrate that prohibiting economic coercion against trade unions is a measure for industrial peace, a means of securing "the equality of position between the parties in which liberty of contract begins."

[7] "The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fearlessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly, transcending the power conferred by the Constitution upon the legislative body." People *v.* Williams, 189 N. Y. 131, 135.

[8] People *v.* Crane, 108 N. E. 427, 28 HARV. L. REV. 498, 628.

[9] Missouri, K. & T. R. Co. *v.* May, 194 U. S. 267, 270; see also Oceanic Navigation Co. *v.* Stranahan, 214 U. S. 320, 340; Pacific Telephone Co. *v.* Oregon, 223 U. S. 118, 150.

teacher of constitutional law, with the vision of a statesman, James Bradley Thayer, to the end that responsibility for mischievous or inadequate legislation may be sharply brought home where it belongs, — to the legislature and to the people themselves.[10]

Felix Frankfurter.

DUE PROCESS OF LAW IN THE FRANK CASE. — Leo Frank, after three unsuccessful attempts to have a conviction of murder set aside by the Supreme Court of Georgia [1] and a fruitless application to the Supreme Court of the United States for a writ of error,[2] petitioned a United States District Court for a writ of *habeas corpus*. The denial of this petition without a hearing on the facts was recently upheld by a majority decision of the Supreme Court.[3] *Frank* v. *Mangum*, 35 Sup. Ct. 582. While the dramatic interest of this *cause célèbre* has been uppermost in the popular mind, the intricate legal issues of the latest appeal make it noteworthy for the profession. The appellant sought to raise the constitutional question necessary for federal *habeas corpus* [4] by contending that he had been deprived of due process of law, first by the reception of the verdict in his absence, and secondly by mob domination of the jury.

The court was unanimous that the first position could not be maintained. Due process of law does not forbid a state statute depriving criminals of indictment and trial by grand and *petit* juries, and the right to appeal.[5] As presence of the accused at all stages of the trial is not an essential of due process,[6] it is submitted that a statute compelling the accused to waive his absence at the reception of the verdict unless timely advantage were taken of it should be upheld as a reasonable measure to prevent dilatory tactics without impairing substantial justice. In the principal case there was no such statute, but the state court held that under the local practice appellant's failure to rely upon this known ground on the first motion for a new trial amounted to such a waiver.[7] If such a rule had in fact been previously established by the courts, a decision in conformity therewith would be no more objectionable than a statute. The appellant contended, however, that the court's decision was an erroneous departure from the established state law [8] and hence a deprivation of due process. But even if the state court's decision, which seems well supported, overruled previous authorities, the Fourteenth Amendment would not give the federal courts jurisdiction to disregard

---

[10] See THAYER, LEGAL ESSAYS, pp. 39, 41.

[1] Frank *v.* State, 141 Ga. 243, 80 S. E. 1016, 27 HARV. L. REV. 762; Frank *v.* State, 83 S. E. 233 (Ga.) ; Frank *v.* State, 83 S. E. 645 (Ga.).

[2] In the Matter of Frank, Petitioner, 235 U. S. 694 (without opinion).

[3] Holmes, J., and Hughes, J., dissenting. For a more detailed statement of the case, see RECENT CASES, p. 810.

[4] U. S. R. S. 753.

[5] Hurtado *v.* California, 110 U. S. 516; Maxwell *v.* Dow, 176 U. S. 581; Andrews *v.* Swartz, 156 U. S. 272.

[6] Howard *v.* Kentucky, 200 U. S. 164.

[7] Cawthon *v.* State, 119 Ga. 395, 46 S. E. 897; Leathers *v.* Leathers, 138 Ga. 740, 76 S. E. 44.

[8] Citing Nolan *v.* State, 53 Ga. 137; S. C. 55 Ga. 521.